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No. 71-947

# In the Supreme Court of the United States

OCTOBER TERM, 1971

FRANK LEE VUCI AND HENRY ANTHONY NOTO,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*

HENRY E. PETERSEN,
*Assistant Attorney General,*

ROGER A. PAULEY,
KENNETH L. GREENMAN, JR.,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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### OPINION BELOW

The *per curiam* order of the court of appeals (Pet. App. 28) is reported at 450 F. 2d 940.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 27) was entered on November 30, 1971, and a petition for rehearing was denied on December 27, 1971

(Pet. App. 29). The petition for a writ of certiorari was filed on January 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether there was sufficient evidence to establish that a crime occurred within the jurisdiction of the trial court.

2. Whether the trial judge erred in admitting corporate tax returns for the purpose of showing the extent of petitioners' gambling operations.

3. Whether there was sufficient evidence to establish that the gambling was conducted for profit, in violation of state law.

4. Whether the government's closing argument was impermissibly prejudicial.

5. Whether evidence of gambling activities different from those set forth in the indictment was improperly admitted.

6. Whether admission of certain business records seized pursuant to a search warrant violated petitioners' Fifth Amendment privilege against self-incrimination.

7. Whether the statute under which petitioners were convicted was amended or repealed by subsequently enacted statutes.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted on three counts (Counts II, III,

IV) of having used interstate facilities to further illegal gambling, and one count (Count I) of having conspired to commit that substantive offense, in violation of 18 U.S.C. 1952 and 371.[1] Petitioner Vuci was sentenced to concurrent terms of five years' imprisonment and fined $10,000; petitioner Noto was sentenced to concurrent terms of three years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. 28).

The evidence showed that for several years petitioners operated a gambling establishment at the Club Louisiane, located on Highway 190 near Port Allen, Louisiana (App. 130, 229-230, 250).[2] The gambling consisted of bookmaking (App. 133, 135, 233, 253-254), card games (App. 117), slot machines (App. 115, 256), and a large bingo operation ostensibly sponsored by civic groups but in fact inuring to the personal benefit of petitioners (App. 217-218, 244 and G.X. 10, 22, 23). Both petitioners, who were brothers-in-law, ran and managed the Club Louisiane (App. 231, 255-257 and G.X. 22, 23). Noto was the general manager of the Club and supervised the horse-betting operations (App. 231, 253, 255), while Vuci was the manager and hired Club personnel (App. 229-230, 252).

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[1] Co-defendant Haskell F. Jones, who was charged in Counts One and Four, was acquitted.

[2] "App." refers to the joint appendix filed in the court below containing the trial court transcript; "G.X." refers to the government's exhibits at trial.

In the course of operations, it was necessary to replenish the bingo equipment (G.X. 12). On January 28, 1967, Vuci ordered one electric bingo blower from Bingo King Co., Englewood, Colorado, in a handwritten letter bearing a Baton Rouge, Louisiana, postmark (App. 167-170 and G.X. 13 A-E). The blower was shipper by common carrier from Colorado to Port Allen, Louisiana, on February 14, 1967 (App. 169-170 and G.X. 13 A-E). Count III of the indictment was based on this transaction.

On June 26, 1967, Vuci telephoned from Louisiana to Bingo King in Colorado and ordered four thousand bingo cards, another blower, and a flashboard (App. 170-171). These items were shipped by common carrier from Colorado to the Club on June 30, 1967 (App. 172 and G.X. 14 A-D). A check endorsed by Vuci was mailed to Bingo King in payment for these items (App. 174-176 and G.X. 9). This transaction was the basis for Count II.

F.B.I. agents executed a search warrant at the Club on January 23, 1969, and seized eighteen telephones, betting slips, a sports blackboard ("tote board"), bingo equipment, and other gambling paraphernalia (App. 132-140 and G.X. 6). Slot machines were removed by the local sheriff (App. 137-138).

On January 24, 1969, co-defendant Haskell Jones' son called Bingo King from Louisiana and asked that Bingo King call his father (App. 203-204). Bingo King called Jones, who placed an order for 1500 bingo cards (App. 205 and G.X. 15 A-G). The cards were shipped by air freight to Jones Brothers in New Or-

leans, Louisiana (App. 265 and G.X. 15 A-G), and were picked up by petitioners' employee and promptly delivered to and used at the Club (App. 270). Count IV was based on this transaction.

## ARGUMENT

1. Petitioners contend that the government failed to prove that the crime for which they were convicted occurred within the jurisdiction of the district court (Pet. 9-13). On the contrary, there was ample evidence on this point. F.B.I. Agent Hardison testified concerning the Club's location near Port Allen (App. 97, 100), as did Agent Butz (App. 130). Agent Butz also discussed the purported sponsorship of the bingo games by two civic groups in neighboring towns (App. 136). Other testimony concerned a call at the Club by the West Baton Rouge Parish Sheriff's Office (App. 138), and numerous additional witnesses described where the Club was situated (App. 217; 229, 244, 250). The Club's tax returns, which were admitted into evidence, show a Port Allen, Louisiana, address and a Baton Rouge, Louisiana, mailing address (G.X. 22, 23), and other documents and testimony showed that petitioners ordered and accepted interstate shipments in the court's district (App. 166-177, 212 and G.X. 13 A-E, 20, 9). The foregoing clearly established venue. See, *e.g.*, *United States* v. *Charlton*, 372 F. 2d 663 (C.A. 6), certiorari denied, 387 U.S. 936.

2. The Club's corporate income tax returns for fiscal years 1968 and 1969 were, contrary to petitioner's

contention (Pet. 14-17), properly admitted into evidence. The return for fiscal year 1968 was signed by Vuci as President and listed Noto as Treasurer, and showed "Machine Income" of $12,802.95, "Wagering Income" of $14,468, and "Bingo Income" of $20,362.77 (G.X. 22). The 1969 return was signed by Noto as Vice President and listed Vuci as President and majority stockholder; it stated that the principal business activity was "Booking & Club Oper." and reported "Machine Income" of $8,346.20, "Gaming Income" of $9,657.00, "Wagering Income" of $97,983.20, and "Bingo Income" of $19,775.30 (G.X. 23).

Petitioners' objection that there was no prior proof that either of them was an officer, agent or stockholder of the corporation is refuted by the record. There was extensive testimony concerning petitioners' operation of the Club, and the government's exhibits included numerous checks on the Club's account signed by petitioners (G.X. 7, 8) and a ledger book seized at the Club and setting forth its receipts and disbursements, including references to petitioners (G.X. 10).

Introduction of the tax returns was not, as petitioners claim, an attempt by the government to prove the unrelated crime of income tax evasion. The trial judge specifically instructed that petitioners were not charged with evasion of income tax and that the purpose of the returns was only to show the extent of the gambling operation (App. 291-292). The returns were plainly relevant to the offenses charged, since they confirmed petitioners' ownership of and partici-

pation in the Club, and showed the existence of a gambling business, the continuous nature of the gambling operation, and that the gambling was conducted for private financial gain and was part of a single cohesive program as alleged in the indictment and urged throughout the government's case. There was no error in using this evidence. Compare *United States* v. *Pauldino*, 443 F. 2d 1108, 1113 (C.A. 10).

3. There is nothing to the contention (Pet. 18) that petitioners' activities were not conducted for profit, but instead were charitable and therefore legal under Louisiana law and not subject to prosecution under federal law. Substantial evidence showed that the two civic organizations that purportedly sponsored the games were used as a "front" by petitioners. Those organizations had no way of knowing what the total proceeds of the bingo games were and did not manage or supervise the games (App. 248), and the income derived from the games far exceeded the amounts paid the organizations for their "sponsorship" (App. 96-130; 249-294; G.X. 10). And the Club's tax returns reflected a large income from bingo, and no deductions for charitable contributions to the civic organizations (G.X. 22, 23).

4. The statement by government attorneys during closing argument, referring to the lack of local prosecution of petitioners, does not, as they claim (Pet. 19), require a new trial. Defense counsel objected to the statement and the trial judge promptly instructed the jury to disregard it (App. 356). The judge also carefully instructed the jury concerning the weight to be

given to comments by counsel (App. 76, 301-302). In view of these instructions, there was no undue prejudice. Compare *United States* v. *Spino*, 345 F. 2d 372, 374 (C.A. 7), certiorari denied, 382 U.S. 825; *United States* v. *Zizzo*, 338 F. 2d 577, 581 (C.A. 7), certiorari denied, 381 U.S. 915.

5. The evidence relating to gambling at the Club Louisiane other than that specifically set forth in the indictment was properly admitted. This evidence showed that gambling by means of slot machines and blackjack games was conducted at the Club; it was relevant as tending to prove the existence of an illegal continuous business enterprise, as the statute (18 U.S.C. 1952) requires, and not just single instances of gambling. See *Spinelli* v. *United States*, 382 F. 2d 871, 892 (C.A. 8), reversed on other grounds, 393 U.S. 410.

6. Petitioners' claim, made here for the first time, that the admission of certain business records of the Club that had been seized pursuant to a search warrant violated their Fifth Amendment privilege against self-incrimination (Pet. 22), is without substance. The records included cancelled checks payable to the "sponsoring" civic organizations (App. 153-154 and G.X. 7, 8), a cancelled check payable to Bingo King (App. 156 and G.X. 9), and pages of the Club's ledger book indicating that funds covering the checks were disbursed (App. 156-157 and G.X. 10). These items were utilized in the operation of the illegal gambling venture and were instrumentalities of the crime charged. They are not testimonial or communicative

in nature, and their introduction therefore did not compel petitioners to become witnesses against themselves in violation of the Fifth Amendment. See *United States* v. *Hanon*, 428 F. 2d 101, 106-107 (C.A. 8), certiorari denied, 402 U.S. 952. Moreover, the records did not belong to petitioners but to a corporation, with respect to whose property petitioners are not entitled to assert the Fifth Amendment privilege against self-incrimination. Cf. *Donaldson* v. *United States*, 400 U.S. 517; *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286.[3]

7. Petitioners' final contention (Pet. 23-24) is that 18 U.S.C. 1955 and 1961, enacted some twenty months after the offense charged and nine months after indictment, conflict with the statute under which they were convicted (18 U.S.C. 1952) and thus impliedly amend or repeal it. By its terms, the exclusion in Section 1955(e) does not cover this situation; while it excludes bingo games run by charitable organizations, petitioners' operation was conducted for their private benefit. And although Section 1961(1)(A) defines "racketeering activity" in terms that would not include petitioners' activities because of the penalty for them under Louisiana law, that definition is not used for Section 1952. Moreover, petitioners' dis-

[3] Petitioners' reliance on *Hill* v. *Philpott*, 445 F. 2d 144 (C.A. 7), certiorari denied, December 14, 1971, No. 71-442, this Term, is misplaced. Among other things, the records introduced in that case were not, like those here, corporate records. See also the government's Memorandum in Opposition in *Scharfman* v. *United States*, No. 71-710, this Term, certiorari denied, February 22, 1972.

cussion of Section 1961 is incomplete; Section 1961 (1)(B) adds that "racketeering activity" also includes any act which is indictable under 18 U.S.C. 1952, thus making clear that no implied amendment or repeal was intended.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

HENRY E. PETERSEN,
*Assistant Attorney General.*

ROGER A. PAULEY,
KENNETH L. GREENMAN, JR.,
*Attorneys.*

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